No. 91-372

In The

Supreme Court of the United States

October Term, 1991

STATE OF GEORGIA,

Petitioner,

v.

THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Georgia

REPLY BRIEF FOR THE PETITIONER

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1. Respondents contend (Br. 2-12) that the racially discriminatory exercise of peremptory challenges by a criminal defendant cannot be state action because the criminal defendant has an adversary relationship to the State with respect to the determination of guilt or innocence. That contention ignores the uniquely governmental character of jury selection and the distinctive role that the defendant plays in that process when exercising a peremptory challenge.

The jury is not a mere assemblage of private citizens. Its members come to court because their presence is compelled by the State; a juror's service is required, or

excused, only by specific action of the trial judge; and the jury once empaneled sits as a "quintessential governmental body" charged with rendering verdicts in accordance with law. *Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. ___, 111 S. Ct. 2077, 2085, 114 L.Ed.2d 660, 676 (1991). The selection of the jury is, therefore, unquestionably an exercise of government power. It is the State that bears the ultimate responsibility to impanel an "impartial jury." U.S. Const. amend. VI. The defendant participates in choosing the jury, through the exercise of peremptory challenges, only because the State has clothed the defendant with that delegated right.

No other action by a criminal defendant is comparable to that exercise of governmental power. The peremptory challenge forms an integral part of the State's system for selecting the decisionmaker; the defendant, by participating in that system, becomes a state actor for a limited purpose. While the State may give the defendant the right to exclude jurors through peremptory challenges, the State may not license the defendant to do so in a racially discriminatory manner – any more than the State can allow private civil litigants or the prosecutor to exercise peremptory challenges in a racially discriminatory manner. As this Court explained in *Edmonson*, 500 U.S. at ___, 111 S. Ct. at 2087, 114 L.Ed. 2d at 678, "[i]f peremptory challenges based on race were permitted, persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system." The resulting injury to the equal protection rights of jurors would directly flow from "governmental delegation and participation" in the peremptory challenge process. *Id.*

Respondents suggest (Br. 5) that "[i]f a defense attorney in representing a defendant accused of a crime is a state actor in exercising peremptory challenges, then the attorney must be considered a state actor in every phase of the trial." That contention is unfounded. Unlike the defendant's strategic actions throughout trial designed to secure an acquittal, the defendant's exercise of a peremptory challenge draws on a power granted by the State as part of the State's process for designating the jurors who will decide the case. That activity is functionally unlike anything else that the defendant does during the trial.[1] A holding that the defendant's peremptory challenge is state action for purposes of applying equal protection limitations would not, therefore, suggest that defense counsel's general representation of the defendant constitutes state action. *See Polk County v. Dodson*, 454 U.S. 312 (1981).[2]

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[1] Amicus National Ass'n of Criminal Defense Lawyers analogizes the peremptory challenge to the subpoena power, which permits the defendant to invoke the court's authority to compel the attendance of a witness. Br. 13-14. Whatever decisions a defendant makes about calling witnesses, however, do not influence the composition of a governmental body, as does the exercise of a peremptory challenge. Nor, in light of the Sixth Amendment's explicit protection of the defendant's right to compulsory process, can the defendant's unilateral decision to cause the issuance of a subpoena be fairly attributed to the State.

[2] *Polk County* noted as characteristic defense functions the entry of a plea, moving to suppress evidence, objecting to government evidence conducting cross-examination, and making closing arguments. 454 U.S. at 320. That case did not

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Nor would a finding of state action imply that the criminal defendant is not an adversary of the prosecutor when exercising particular peremptory challenges. The State expects the defendant to act in his own interest when exercising peremptory challenges.[3] The finding of state action simply means that when the defendant uses peremptory challenges to eliminate jurors because of their race, the defendant is using power "possessed by virtue of state law" and is inflicting injury on the excluded jurors that is "made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). If the Fourteenth Amendment is to succeed in the purpose of eliminating race as a valid criteria for denying jury service, the defendant's peremptory challenges must be treated as state action.

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consider the role of defense counsel during jury selection, nor did the case examine whether the special factors surrounding the peremptory challenge process justify treating that function as state action for the purposes at issue here. As this Court noted in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974), state action determinations must focus on the particular function at issue, and "differences in circumstances beget differences in law."

[3] Indeed, the State's purpose in allowing such challenges is to enhance the appearance that the verdict is rendered by persons who are fair, and thereby to promote acceptance of the verdict by the defendant and the community. That purpose is not inconsistent with a rule that the defendant cannot use discrimination to undermine the credibility of the trial process by eliminating jurors on the basis of race.

2. Respondents argue (Br. 13-24) that fulfillment of the defendant's right to an "impartial jury" requires that the defendant must have the opportunity to exercise peremptory challenges for racially discriminatory reasons. This Court has already rejected respondents' argument.

A criminal defendant has no constitutional right to exercise peremptory challenges. *Ross v. Oklahoma*, 487 U.S. 81, 89 (1988); *Batson v. Kentucky*, 476 U.S. 79, 91 (1986); *Swain v. Alabama*, 380 U.S. 202, 219 (1965); *Stilson v. United States*, 250 U.S. 583, 586 (1919). The Constitution requires that the venire be assembled from a fair-cross section of the community. The Constitution also requires that jurors be excluded when they indicate they are incapable of rendering a verdict in accordance with the law and the evidence. A State is not required, however, to permit the defendant to remove a juror when there is no "cause" to believe that the juror is biased. Because a jury can be "impartial" without the defendant having had *any* peremptory challenges, the defendant's right to a fair trial is not infringed when the privilege of the peremptory challenge is limited by prohibiting its use to remove a juror because of his race.

Indeed, the relatively modest inroad on the peremptory challenge that is at issue in this case would hardly strip the defendant of the benefits of that device, any more than application of the holding in *Batson* destroyed the utility of the challenge for prosecutors. *Batson v. Kentucky*, 476 U.S. at 98-99 (rejecting contention that the Court's holding will "undermine the contribution the challenge generally makes to the administration of justice"). The concern raised by Amicus National Ass'n of

Criminal Defense Lawyers (Br. 24) that application of *Batson* to the defense would "fatally undermin[e] the defendant's ability to keep from the jury those whom the defendant senses will not be fair" is, therefore, vastly overstated. Moreover, if Respondents fear that the jurors in their case may harbor racial prejudice, the law provides remedies that address that concern. When the potential for racial bias exists, it may be tested through appropriate voir dire. *See Turner v. Murray*, 476 U.S. 28 (1986); *Ham v. South Carolina*, 409 U.S. 524 (1972). If bias is widespread in the community, it may justify a change in venue. *See Irwin v. Dowd*, 366 U.S. 717 (1961). Respondents' fears, however, cannot justify the exercise of peremptory strikes as an outlet for racial prejudice.

Respondents claim (Br. 23) that the defendant must be allowed "to eliminate from the trial jury members of another race whom the defendant fears may be influenced against him by race-based emotion or racial loyalty"; this is true, according to Respondents (Br. 14 n.2), because "among all races there undeniably and understandably exists racial pride, loyalty, and fellowship," which leads, "whenever, a choice must be made, in the very human tendency of a member of one race unwittingly to favor his or her race." Acceptance of Respondents' argument would strike deeply at the value of race-neutrality in jury selection that numerous decisions of this Court have sought to uphold.[4] This Court has firmly

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[4] *See, e.g., Powers v. Ohio*, 499 U.S. ___, 111 S. Ct. 1364, 113 L.Ed.2d 411 (1991) (according standing to criminal defendants to challenge racially based strikes by the prosecutor whether or

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rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror. *Batson v. Kentucky*, 476 U.S. at 97-98, ("[T]he prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption – or his intuitive judgment – that they would be partial to the defendant because of their shared race. * * * The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race."). Respondents' argument is rooted in exactly the type of race-based assumptions that this Court has sought to banish from the courtroom.

The courtroom is a place that both symbolizes and provides the means for enforcing the requirements of the law; the courtroom should not be a place in which official approval is given to the claim that a juror's decisions would be governed by the color of his skin. The injury to equal protection values caused by the race-based exclusion of a juror is not diminished when it is effected at the behest of a criminal defendant. For a trial judge to allow a defendant to deny a person the opportunity to participate

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not the defendant is the same race as the excluded juror); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (condemning discrimination in grand juries); *Hill v. Texas*, 316 U.S. 400 (1942) (condemning discrimination in grand juries); *Ex Parte Virginia*, 100 U.S. 339 (1880) (condemning discrimination against jurors by judges); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (condemning discrimination against jurors by statute).

in the civic duty of jury service because of his race is to have the government tacitly acquiesce in a form of discrimination that the Constitution commands government to eradicate. Here, as in *Powers v. Ohio*, 499 U.S. at ___, 111 S. Ct. at 1370, 113 L.Ed.2d at 424, the judicial system "may not accept as a defense to racial discrimination the very stereotype the law condemns."

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted,

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